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No. 10-285

U.S.
SEP 27 2010

In the
Supreme Court of the United States

CNG FINANCIAL CORPORATION,
Petitioner,

v.

ALLEN L. DAVIS,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Ohio, Hamilton County

BRIEF IN OPPOSITION

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QUESTION PRESENTED

This case involves a Close Corporation Agreement ("CCA") signed by Respondent Allen L. Davis ("Davis"), his two sons, and Petitioner CNG Financial Corporation ("CNG"). The CCA includes an unambiguous dispute resolution provision, which provides for arbitration but applies only to disputes involving the "Original Shareholders." The CCA defines "Original Shareholders" as Davis and his two sons. So even though Petitioner signed the CCA, it was not included within the CCA's definition of "Original Shareholder." The actual question presented, therefore, is whether Petitioner may force Davis to arbitrate his dispute with Petitioner, despite the fact that the dispute resolution provision of the CCA that Petitioner signed excludes Petitioner from the list of parties entitled to invoke the provision and excludes this matter from the disputes that could be arbitrable under the provision.

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REASONS FOR DENYING THE PETITION

The Supreme Court of Ohio twice has determined that the issue raised in the Petition is not a question of public or great general interest in Ohio.[1] Having lost there as well as in the trial court and Ohio's First District Court of Appeals without ever raising any significant federal issue, Petitioner CNG now asks this Court, ostensibly under the guise of furthering federal policy favoring arbitration, to force Respondent Davis to arbitrate its dispute with him, a dispute he never agreed to arbitrate. No aspect of federal arbitration policy or law justifies revisiting an issue on which the Court could not have been clearer: "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960).

This case does not involve a non-signatory seeking to enforce an arbitration clause against a signatory. Petitioner and Respondent are both signatories to the CCA. As signatories, both agreed on which disputes would be arbitrable under the CCA's dispute resolution provision and which would not. That provision, § 5.12, states in relevant part as follows:

> If the Original Shareholders dispute any matter arising out of or relating to this Agreement except for any matter subject to the provisions of § 2.9, then each Original Shareholder shall

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[1] *See* Reconsideration Entry of the Supreme Court of Ohio, Petition at Appendix 1a, and Entry of the Supreme Court of Ohio, Petition at Appendix 2a.

> designate a representative (a "Committee Member", or collectively, the "Committee"). The committee shall meet at least once and attempt to resolve the dispute. Any Original Shareholder may request that the Committee Members be appointed and meet within 14 days at a mutually-agreed place and time. If the matter has not been resolved within 20 days of the first meeting of the Committee (which period may be shortened or extended by the agreement of all of the Original Shareholders) by the unanimous decision of the Committee, the controversy will be settled by arbitration in accordance with the commercial rules of the American Arbitration Association then in effect....

The CCA defines "Original Shareholders" as Davis and his two sons, Jared and David. CCA, § 2.6(b) ("Allen, David and Jared (each, an 'Original Shareholder' and collectively, the 'Original Shareholders')..."). Under § 5.12, only disputes between "Original Shareholders" are even potentially arbitrable, and the definition of "Original Shareholders" does not include Petitioner. Because, as the courts below recognized, this is nothing more than a dispute between Respondent and Petitioner, it is not a dispute that Respondent agreed to arbitrate. Equally important, by signing an agreement containing a dispute resolution clause that excludes this dispute from arbitration, Petitioner agreed that Respondent would not have to arbitrate disputes with Petitioner (rather, only his disputes with his sons). No conceivable federal interest could impel the Court to rescue Petitioner from the consequences of its own agreement.

There is yet another respect in which the language of § 5.12 disqualifies Petitioner from invoking arbitration. Even among the three Original Shareholders who are subject to arbitration under § 5.12, the obligation to arbitrate cannot ripen until all four of the following steps have been taken:

1. REQUEST FOR COMMITTEE. The Original Shareholder initiating the ADR process must request that another Original Shareholder with whom he has a dispute appoint a representative to a committee.

2. COMMITTEE MEMBER APPOINTMENTS. The initiating Original Shareholder and the other Original Shareholder(s) must appoint persons who will represent them on the committee.

3. NEGOTIATION MEETING. No more than 14 days after the committee is appointed, it must meet and attempt to resolve the Original Shareholders' dispute through negotiation.

4. COOLING-OFF PERIOD. The Original Shareholders must wait 20 days after the meeting; if the dispute has not been resolved, the process of appointing arbitrators begins.

Only an Original Shareholder himself can take the first two steps in this mandatory process. Petitioner did not, and could not, initiate the first and second steps because, as noted, it was not an Original Shareholder. Again, Petitioner agreed to this

provision and should not be permitted to harness itself to federal law or policy to extricate itself from the consequences of its agreement.

The proceedings below involved the application of an unambiguous contractual provision. Thus, the very premise of the Petition, *i.e.*, that "a presumption of arbitrability applies where an arbitration agreement is ambiguous," does not apply. Petition at (i). Both the state trial court and the state court of appeals found that the dispute resolution provision was clear and unambiguous and that its language ruled out any arbitration of this dispute. The trial court stated that CNG lacked the capacity to compel arbitration because it was not an Original Shareholder.[2] The state court of appeals affirmed, reaching the same conclusion.[3] The analyses by each of these courts are consistent with the principle that arbitration is a matter of contract governed by the expressed intent of the parties. *Steelworkers*, 363 U.S. at 582. The contract that CNG signed could not be any clearer: the dispute resolution clause restricts arbitration to disputes

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[2] Petition at Appendix 7a ("The Close Corporation Agreement's Section 5.12 only applies to disputes among the original shareholders. CNG is not an original shareholder.").

[3] Petition at Appendix 5a ("In this case, the parties to the CCA did not agree to arbitrate the dispute. Even though CNG was a party to the CCA, the only parties listed in the arbitration provision were Davis and his sons. There was no mechanism in the agreement to allow anyone other than the Original Shareholders to participate. By specifically naming only some of the parties to the agreement, the parties implied their desire to exclude all others not named. The doctrine expressio unius est exclusio alterius 'justifies] the inference that items not mentioned were excluded by deliberate choice, not inadvertence.'").

between Original Shareholders, and Petitioner does not meet this qualification.

CONCLUSION

The Court should deny the petition for a writ of *certiorari*.

Respectfully submitted,

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